

Carte Blanche for Political Abuse

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Bulgaria has established one of the most aggressive confiscation regimes in Europe, allowing seizure of assets without a criminal conviction and putting the burden of proof in the procedure on the owner. Bulgarian law, as it stands, has no specific safeguards to prevent misuse, and has been criticized by the European Court of Human Rights (ECtHR) in cases like [Dimitrovi v Bulgaria](#). Furthermore, [questions](#) have been raised as government opponents and critics seem to be prime targets of these confiscation measures. In a preliminary reference to the Court of Justice of the European Union (CJEU) from Sofia's City Court on that issue, Advocate General Eleanor Sharpston has recently delivered her opinion which leaves the door wide open for political abuse by Bulgarian authorities.

The Bulgarian Supreme Court, in an [interpretative decision](#) of December 2018, which is binding on all courts, held that assets could not be confiscated without a final criminal conviction because the presumption of innocence applied. This safeguard was short-lived as the Bulgarian legislator enacted amendments in a rush to curtail the effects of this decision. In this context, it is not surprising that the Bulgarian judiciary is seeking to verify if Bulgaria's legislation on confiscation is compatible with EU law. On 3rd April 2018, the Sofia City Court lodged a request for a preliminary reference to the CJEU to clarify the application of [Directive 2014/42/EU of 3rd April 2014 on "freezing and confiscation of instrumentalities and proceeds of crime"](#) in the EU. On 31st October 2019, Advocate General Eleanor Sharpston delivered her [Opinion](#) on the case.

Which Is the Applicable EU Legislative Instrument?

AG Sharpston first considered the applicable legislation in the case. Despite the questions raised by the national court, she concluded that Directive 2014/42/EU was not applicable *ratione temporis* since the implementation period expired on 4 October 2016 while the case was presented to the national court on 22 March 2016. This result, however, is debatable.

AG Sharpston based her argument on settled case-law establishing that a Directive had direct effect only after the transposition period expired. She does not address an alternative condition, though. In [joined Cases C-468/10 and C-469/10](#), the ECJ held: "Whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement that directive in domestic law by the end of the period prescribed or where it has failed to implement that directive correctly" (para. 51). The crucial point here is that the Directive not only entered into force in 2014, but it was implemented

in national Bulgarian legislation as early as 2015 through an amendment to the motivation of the [Law on the Confiscation of Illegally Obtained Assets of 2012](#).

But even if the Directive had not been applicable *ratione temporis* because the transposition period was still ongoing, the principle of loyal cooperation requires Member States during that period to refrain from adopting measures undermining the result sought by a Directive. This is the case when the legislator adopts a legal instrument, and it is also the case when a national court applies the existing law by interpreting it in a way which allows the intended effect of the EU legislation in question.

Disguised Criminal Proceedings

Under Bulgarian law, the very initiation of criminal proceedings allows the Commission for Confiscation to initiate confiscation proceedings. Hence, a second issue, which attracted the attention of AG Sharpston, was whether the latter proceedings are criminal or civil in nature. In passing, AG Sharpston stated that Directive 2014/42/EU does not apply in the case at hand *ratione materiae* either because the offense described in the preliminary reference (embezzlement) does not fall within the scope of offenses referred to in its Article 3. Even further, she argued that while the [Framework Decision 2005/212/JHA on “confiscation of crime-related proceeds, instrumentalities and property”](#), which preceded the Directive, was potentially applicable *ratione temporis* and while the offense described fell within its scope, the Framework Decision could not be applied to the case at hand because the proceedings before the national court are not proceedings in relation to a criminal offense within the meaning of Article 1 of Framework Decision 2005/212/JHA (para 66 of the Opinion).

Is that so? While, as AG Sharpston properly reminds the Court, it is for the national court to qualify the nature of proceedings, it is also important to have a unified understanding of what a criminal proceeding/proceeding linked to an offense at the EU level is. Reasoning in the reverse would leave it to the sole discretion of Member States to apply a Directive or not by a simple qualification without materiality.

To qualify the nature of confiscation proceedings under Bulgarian law, it is necessary to analyze those provisions of national law which allow the confiscation of property. As seen from Article 108 of the current [Law on Combating Corruption and the Confiscation of Illegally Obtained Assets](#) of 2018 as well as Article 21 of the 2012 law, which preceded it, the Commission for Confiscation can start proceedings at the condition that a person is considered an accused party for crimes listed in the law. Without criminal charges, confiscation proceedings are impossible. This was also established by the ECtHR in [Dimitrovi v Bulgaria](#) where the Court held that the purpose of the national law adopted in 2012 is to combat corruption and organized crime by enabling the state to seize property originating from criminal activity.

Furthermore, the law states that in performing its duties the Commission for Confiscation interacts with the Prosecution and the Police. It also says the Prosecution is obliged to inform the Commission of all decrees it renders in the

investigation. In other words, the Commission uses materials from the criminal investigation for its own investigation. However, the affected person is deprived of the procedural rights that typically apply to criminal proceedings, such as the burden of proof resting on the authorities, presumption of innocence, right to fair trial, etc.

In its 2018 interpretative decision, the Bulgarian Supreme Court of Cassation recognized the issue and held that if a criminal case, on which a claim for civil confiscation is based, ends without a conviction, the claim for civil confiscation of property can neither be filed, nor sustained.

A Question of Fundamental Rights

Despite the above facts, and maybe due to the imprecise explanations, which the national court provided in these proceedings, AG Sharpston asserted these proceedings were of a civil law nature, which is not a sustainable argument. Besides, she argued that the fundamental rights and safeguards provided for by the legal order of the Union would not apply as the case was outside the scope of EU law, as long as it was “civil”. She also said that “there is nothing in this Framework Decision which makes confiscation dependent on a final conviction”, her main argument being the definition of confiscation in the Framework Decision 2005/212/JHA.

Not only is Framework Decision 2005/212/JHA applicable, but the AG’s comments are not entirely convincing because they ignore the rest of the provisions of the Framework Decision. The recitals of the Framework Decision mention the EU Charter of Fundamental Rights and its Article 8 explicitly refers to fundamental rights, and specifically to the presumption of innocence. Besides, its Articles 2 and 3 prescribe that to be confiscated, either wholly or in part, a property should either be the proceeds or instrumentalities of a criminal offence or belong to a person, convicted of an offense.

Finally, one of the AG’s key points is that although 2014/42/EU does not apply *ratione materiae*, it nonetheless replaces certain provisions of the Framework Decision (para. 44). These provisions are the first four indents of Article 1 and Article 3: in particular, the Directive modifies the definition of the confiscation as meaning “a final deprivation of property ordered by a court in relation to a criminal offence”. Due to the *ratione temporis* question, the AG considers that these provisions cannot be relied upon directly in the case at hand. In fact, however, due to the early (and I would dare to say incorrect) transposition of the Directive by Bulgaria, the Directive is applicable, and therefore the confiscation definition in question should apply. In other words, the applicable EU law provides that confiscation, including in the case of extended confiscation, should only be subject to the property of a person who was convicted by a court whose judgement has the force of *res judicata*.

Doors Wide Open for Political Abuse

To understand the Bulgarian sensitivities towards providing appropriate guarantees in proceedings concerning confiscation, we need to consider Bulgaria’s legal and

historic background. *Magistrats Européens pour la Démocratie et les Libertés* have already [raised concern](#) regarding the powers and political dependencies of the Commission for Confiscation (now renamed Anti-Corruption Commission) which is the main agency responsible for confiscation of assets in Bulgaria. Despite its great powers, there are no explicit rules regarding its control.

The same issue applies regarding the Bulgarian prosecution authorities [due to their vertical structure](#) lacking checks and balances – an issue [regularly raised](#) by the ECtHR and the Council of Europe. Anyone could become accused upon the unilateral decision of a prosecutor who has excessive powers. In that regard, the Council of Europe has repeatedly asked for Bulgaria to reform its model of the Prosecution Office, which has not been reformed since communist times. At the same time, the Prosecution Office is in charge to open an investigation and to inform the Commission for Confiscation, which can start its own proceedings.

In that environment, it is very doubtful that AG Sharpston's analysis will help Bulgarian courts in applying basic EU principles and values. It is more likely that her Opinion will be seen as a *carte blanche* for the unbridled application of the “civil” confiscation procedure against political opponents. In this regard, AG Sharpston seems to forget that the legal interpretation of EU Law should remain teleological and integrative. Her Opinion, while expertly written, is falling in the trap of technicalities instead of focusing on principles such as the presumption of innocence. Hopefully, the Court will insist on these principles at the heart of the EU.

